A **KETHEESWARAN KANAGARATNAM & ANOR v. PP**

HIGH COURT MALAYA, KLANG
AZMI ABDULLAH J
[NOTICE OF MOTION NO: BL-44-6-09-2020]
3 JUNE 2021

B

CONSTITUTIONAL LAW: *Legislation – Constitutionality – Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 ('ATIPSOM'), s. 61A ('impugned provision') – Impugned provision provided deposition by trafficked persons or smuggled migrants who could not be found be accepted as prima facie*
C *evidence without need for cross-examination – Whether impugned provision contravened arts. 121(1), 8(1) and 5(1) of Federal Constitution – Whether impugned provision excludes judicial power of courts to decide or arrive at decision – Whether denial of right to cross-examine denial of right to fair trial – Whether denial of right to cross-examine caused inequality to applicants – Whether ATIPSOM being*
D *specific Act prevails over Evidence Act 1950 and Criminal Procedure Code*

The applicants were facing three counts of charges under s. 12 of the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 ('ATIPSOM'). For the purpose of the trial, the prosecution delivered on the applicants the depositions made by three victims in the three charges
E pursuant to s. 51A of the Criminal Procedure Code ('CPC'). Hence, the applicants' current motion to challenge the constitutionality of s. 61A of the ATIPSOM. The said section essentially provides that deposition of trafficked persons or smuggled migrants who could not be found would be accepted as *prima facie* evidence without the need for it to be tested under cross-
F examination. In support of the motion, the applicants contended, s. 61A of the ATIPSOM was unconstitutional and in contravention of arts. 121(1), 8(1) and 5(1) of the Federal Constitution ('FC'). The applicants also posited, i*nter alia*: (i) the power to decide a *prima facie* case is a judicial power that should be rightly exercised by a judge and no other. However, s. 61A of the
G ATIPSOM has the effect of excluding such judicial power; (ii) art. 5(1) of the FC prohibits the enactment of any legislature that would deprive life, liberty, or the rule of law. Since s. 61A deprived the applicants the right to cross-examine the deponents, the formers' right to liberty had been transgressed; (iii) all persons are equal before the law and ought to be subjected to equal
H protection of the law, as such, the applicants should be fairly treated with fair procedure. By denying the right to challenge the depositions and to cross-examine them, the applicants' right under art. 8(1) of the FC had been violated; and (iv) s. 61A of the ATIPSOM is also contrary to the statutory requirement as set out under the Evidence Act 1950 ('EA') and CPC.

I

Held (dismissing motion):

(1) Section 61A of the ATIPSOM, by its wording, still retains the court's judicial power to rule and decide, as the arbiter to make a finding and arrive at a decision. The said section is concerned only with *prima facie* evidence and the consideration of the deposition itself does not provide a *prima facie* case. In order to establish a *prima facie* case, the courts still have to view the evidence in totality before arriving at its decision. The depositions made would still be subject to an analysis as to its contents, irrespective of the non-allowance of cross-examination. Thus, for the final decision, totality of evidence would still form the basis for the court's decision. The court still functions as the final arbiter, hence, s. 61A of the ATIPSOM does not usurp the judicial power of the court. Article 121(1) of the FC had not been infringed. (paras 14, 19 & 22)

(2) It has always been the position of the law that the right, as enumerated under art. 5(1) of the FC, to be not absolute. Given the fact that s. 61A of the ATIPSOM is a specific and explicit law, which had also been provided as being the exclusion stated in the said article, the section therefore could not be said to be in contravention of art. 5(1). Non-allowance of cross-examination is not a denial of fair trial. Deposition was only a single aspect of evidence to be produced at trial. In fact, it is still subject to examination by the trial judge. This evidence by deposition is not the be all and end all as regards evidence to prove a *prima facie* case. Thus, s. 61A of the ATIPSOM does not contravene art. 5(1) of the FC. (paras 29 & 30)

(3) The equality provision under art. 8(1) of the FC is not absolute and it does not mean all laws must apply uniformly to all persons in all circumstances everywhere. From item 8 mentioned in the case of *Datuk Hj Harun Hj Idris v. PP*, where there are two procedures existing side by side, the one that is more drastic and prejudicial is unconstitutional, if there is in the law no guideline as to the class of cases in which either procedure is to be resorted to. However, it is constitutional if the law contains provisions for appeal, so that a decision may be reviewed by a higher authority. Section 61A of the ATIPSOM does not fall foul of this condition as the ATIPSOM does contain provision for appeal. Hence, it does not infringe art. 8(1) of the FC. (paras 33-34)

(4) From the reading of s. 5 of the ATIPSOM, it is clear that the provisions contained in the ATIPSOM, *ie*, s. 61A, would override the requirement as stated in s. 145 of the EA due to the maxim *generalibus specialia derogant* that a general Act is made subject to a specific Act. Therefore, the specific provisions in the ATIPSOM must be given its full effect. In

the circumstances, s. 61A of the ATIPSOM does not contravene arts. 121(1), 8(1) and 5(1) of the FC and should not be declared unconstitutional. The motion was dismissed. (paras 37, 38 & 43)

Case(s) referred to:

Amurthalingam Tamajeeran v. PP [2018] 1 CLJ 662 HC ***(refd)***
Datuk Hj Harun Hj Idris v. PP [1976] 1 LNS 19 FC ***(refd)***
Deputy Chief Police Officer Of Perak & Anor v. Ramesh Thangaraju [2001] 1 CLJ 245 CA ***(refd)***
Gakyah Buyong lwn. PP [2016] 3 CLJ 919 HC ***(refd)***
In Re Mohamad Ezam Mohd Nor [2002] 5 CLJ 156 HC ***(refd)***
Indira Ghandi Mutho v. Pengarah Jabatan Agama Islam Perak & Ors And Other Appeals [2018] 3 CLJ 145 FC ***(refd)***
Jimmy Seah Thian Heng & Ors v. PP & Other Applications [2018] 9 CLJ 769 HC ***(refd)***
Lee Kwan Woh v. PP [2009] 5 CLJ 631 FC ***(refd)***
Letitia Bosman v. PP & Other Appeals [2020] 8 CLJ 147 FC ***(refd)***
Maria Chin Abdullah v. Ketua Pengarah Imigresen & Anor [2021] 2 CLJ 579 FC ***(refd)***
Mohd Faudzi Othman v. PP [2015] 1 LNS 1019 HC ***(refd)***
PP v. Chew Siew Luan [1982] CLJ 354; [1982] CLJ (Rep) 285 FC ***(refd)***
PP v. Choo Chuan Wang [1992] 2 CLJ 1242; [1992] 3 CLJ (Rep) 329 HC ***(refd)***
PP v. Dato' Yap Peng [1987] 1 LNS 28 HC ***(refd)***
PP lwn. Ibrahim Sultan Mohamad [2020] 1 LNS 974 HC ***(refd)***
PP v. Kok Wah Kuan [2007] 6 CLJ 341 FC ***(refd)***
PP v. Ooi Kee Saik & Ors [1971] 1 LNS 113 HC ***(refd)***
PP v. Shahrulnizam Othman & Ors [2011] 5 CLJ 674 HC ***(refd)***
PP v. Sumon Khan & Anor [2018] 1 LNS 1506 CA ***(refd)***
Re Tan Boon Liat @ Allen & Anor Et Al; Tan Boon Liat v. Menteri Hal Ehwal Dalam Negeri & Ors And Other Appeals [1977] 1 LNS 110 FC ***(refd)***
Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat & Another Case [2017] 5 CLJ 526 FC ***(refd)***
Shamim Reza Abdul Samad v. PP [2009] 6 CLJ 93 FC ***(refd)***
Sivarasa Rasiah v. Badan Peguam Malaysia & Anor [2010] 3 CLJ 507 FC ***(refd)***
Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 2 CLJ 771 CA ***(refd)***
Vigneswaran Murugaiah lwn. Pendakwaraya (Permohonan Jenayah No. 44-85-04-2017) (Unreported) ***(refd)***

Legislation referred to:

Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007, ss. 5, 12, 52, 61A
Courts of Judicature Act 1964, s. 30(1)
Criminal Procedure Code, s. 51A
Evidence Act 1950, ss. 32, 145, 146
Federal Constitution, arts. 5(1), 8(1), 121(1)
Immigration Act 1959/63, s. 35
Land Acquisition Act 1960, s. 40

For the applicant - A Athimulan & K Kumaraendran; M/s Mohana Krishnan
For the respondent - Yusaini & Haslinda Che Seman; DPP

Reported by Syamim Ariffin

JUDGMENT

Azmi Abdullah J:

[1] The applicants are facing three charges at the Klang Sessions Court under s. 12 of ATIPSOM. The prosecution delivered on the applicants as part of the evidence for the prosecution pursuant to s. 51A of the Criminal Procedure Code (CPC) the depositions made by three persons mentioned as the victims in the three charges being Anmuni Maria, Yani Tri Anda and Fransisaka.

[2] The challenge mounted in this motion is against the constitutionality of s. 61A of Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 (ATIPSOM) with the impugned provision being argued to be against arts. 121(1), 8(1) and 5(1) of the Federal Constitution (FC). The learned Sessions Court Judge exercising the provision of s. 30(1) of the Courts of Judicature Act 1964, stayed the proceedings and transmitted the matter to the High Court to determine the constitutional challenge against s. 61A of ATIPSOM.

[3] Section 61A of ATIPSOM essentially provides that the deposition of trafficked persons or smuggled migrants who cannot be found would be accepted as *prima facie* evidence without the evidence being tested under cross-examination at the trial for the charges under s. 12 of ATIPSOM being levelled against the applicants in this instance.

[4] Section 61A of ATIPSOM states:

> 61A. Admissibility of deposition of trafficked person or smuggled migrant who cannot be found
>
> (1) Notwithstanding anything contained in this Act and any written law to the contrary, where in any proceeding for an offence under this Act a testimony of any person in respect of whom an order of removal from Malaysia has been made by the Director General under section 32 or 33 or subsection 56(2) of the Immigration Act 1959/63 is required by the court, there shall be admissible in evidence before that court any deposition relating to the subject matter of that proceeding made by that person:
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> (a) in Malaysia before a Sessions Court Judge or a Magistrate in the presence or absence of the person charged with the offence; or
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> (b) outside Malaysia before a consular officer or a judicial officer of a foreign country in the presence or absence of the person charged with the offence, and any such deposition shall, without further proof, be admitted as *prima facie* evidence of any fact stated in the deposition.

(2) It shall not be necessary for any party in any proceeding to prove the signature or official character of the Sessions Court Judge, Magistrate, consular officer or judicial officer before whom the deposition under subsection (1) was made.

(3) For the purposes of this section, a reference to:

(a) A "deposition" includes any written statement made upon oath; and

(b) An "oath" includes an affirmation or declaration in the case of persons allowed by law to affirm or declare instead of swear.

(4) Nothing in this section shall prejudice the admission as evidence of any other depositions.

Article 121(1) Of Federal Constitution

[5] Article 121(1) states:

Judicial power of the Federation

121(1) There shall be two High Courts of co-ordinate jurisdiction and status, namely:

(a) One in the States of Malaya, which shall be known as the High Court in Malaya and shall have its principal registry at such place in the States of Malaya as the Yang di Pertuan Agong may determine; and

(b) One in the States of Sabah and Sarawak, which shall be known as the High Court in Sabah and Sarawak and shall have its principal registry at such place in the States of Sabah and Sarawak as the Yang di Pertuan Agong may determine;

(c) (Repealed)

And such inferior courts as may be provided by federal law; and the High Courts and the inferior courts shall have jurisdiction and powers as may be conferred by or under federal law.

[6] The argument of the applicants is that the act of determining whether there is a *prima facie* evidence involves judicial assessment hence the power to decide a *prima facie* case is a judicial power that should rightly be exercised by a judge and no other. By virtue of art. 121(1) of the Federal Constitution, the power to decide the *prima facie* evidence is a judicial power that is vested in the courts. Section 61A of ATIPSOM has the effect of excluding the judicial power to adjudicate whether the victim's evidence proves a *prima facie* evidence hence rendering it unconstitutional due to legislative incursion.

[7] Pertaining to whether the impugned provision is against art. 121(1) of FC, it must first be observed as trite that there is a presumption of constitutionality in every legislation enacted by Parliament.

[8] It is also observed that the doctrine of separation of powers is to be practiced in order to have the necessary check and balance between the three known branches of the Executive, Legislative and the Judiciary so that one branch does not encroach upon the sphere of the other and every branch is kept to within its confines or parameters. As much as the courts are to provide a check and balance to the powers of the legislative, it must also remind itself to refrain from transgressing the confines as limited by the FC and encroaches into the law-making power of the Legislature.

[9] In reference to the decision in *Letitia Bosman v. PP & Other Appeals* [2020] 8 CLJ 147; [2020] 5 MLJ 277 the Federal Court stated at para 28:

> While none is superior to the other, both the judiciary and the Legislature are subject to the FC, being the supreme law of the country. In Malaysia only the FC is supreme law (see *Tun Mohamed Suffian's An Introduction to the Constitution of Malaysia* (3rd Ed) at p 17). This has an important implication: like all legal powers, judicial power and legislative powers have constitutional limits ...

[10] In *PP v. Kok Wah Kuan* [2007] 6 CLJ 341; [2008] 1 MLJ 1 at para 22 it was held:

> So even if we say that judicial power vests in the courts, in law, the nature and extent of the power depends on what the constitution provides not what some political thinkers think judicial power is.

[11] From the cited paragraph in *Letitia Bosman* this court thus is guided that given the provision of art. 121 of FC, the execution of the judicial power must be in accordance with Federal laws and cannot supersede the confines that have been laid down.

[12] The majority decision of the Federal Court in the case *Maria Chin Abdullah v. Ketua Pengarah Imigresen & Anor* [2021] 2 CLJ 579 has again reemphasised that by stating at para 88:

> [88] Clearly, it is a term of Art 121(1) of the Federal Constitution that the jurisdiction and powers of the courts are "as conferred by or under federal law ..."

[13] It is this court's finding that the impugned provision differs from *Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat & Another Case* [2017] 5 CLJ 526; [2017] 3 MLJ 561, *Indira Ghandi Mutho v. Pengarah Jabatan Agama Islam Perak & Ors & Other Appeals* [2018] 3 CLJ 145; [2018] 1 MLJ 545, *Jimmy Seah Thian Heng & Ors v. PP & Other Applications* [2018] 9 CLJ 769; [2019] 7 MLJ 308 and *PP v. Dato' Yap Peng* [1987] 1 LNS 28; [1987] 2 MLJ 311, as those precedents deal with situations whereby the exercise of judicial power was being taken from the courts ie in *Semenyih Jaya* it was placed with the assessors, in *Indira Ghandi* it was with the Syariah Court whilst in *Jimmy Seah* and *Dato' Yap Peng* it was with the Public Prosecutor.

[14] Section 61A of ATIPSOM by its wording still retains the court's judicial power to rule and decide with the court's powers not being transgressed as the arbiter to make a finding and to arrive at a decision.

[15] Section 61A of ATIPSOM in essence is in *pari materia* with s. 40A of the Immigration Act (Amendment) 2002. The said s. 40A was promulgated to resolve the problem of the Government having to bear the high costs of providing foods and drinks for the illegal immigrants whilst they are under detention depots pending the conclusion of trial and also the concern of their country of origin as regards their detention. Hence, the existence of the provisions is to ensure that the lengthy detentions are avoided.

[16] In discussing s. 40A of the Immigration (Amendment) Act 2002, in *PP v. Shahrulnizam Othman & Ors* [2011] 5 CLJ 674, the court decided that s. 40A operates to the exclusion of any other written law since no such provision to the contrary has been inserted to the Act and this is also the same situation as found in s. 61A of ATIPSOM. It was the decision of the court that the right to cross-examine not being included in the section should be preserved:

> Upon the reading of s. 40A of the Act, the court was of the view that there is no lacuna in the section as it is quite clear that the words "Notwithstanding anything contained in this Act and any written law to the contrary" explicitly excludes any other written laws that is the Evidence Act 1950 and the Rules of High Court 1980 in the application of s. 40A. If Parliament had intended that any other provisions in any other written law to the contrary applies to s. 40A of the Act, then it would have clearly stated so as it did in s. 52(4) of the Anti-Trafficking in Persons Act 2007 where Parliament had intended that in the course of recording of evidence of the trafficked person, he shall be examined in accordance with the provisions of the Evidence Act 1950. *I am not prepared to read words into s. 40A and interpret in the way learned counsel for the respondents had submitted. In the circumstances, the learned magistrate was wrong in her approach to have allowed the respondents counsel the right to cross-examine the deponent.* (emphasis added).

[17] These further cases illustrate decisions pertaining to the working of s. 61A of ATIPSOM and the acceptance by the courts of the exception to the right to cross-examine in the provision therein. In *Mohd Faudzi Othman v. PP* [2015] 1 LNS 1019, it was commented that the taking of the deposition before a Sessions Court Judge or a Magistrate has been intended to safeguard and prevent a deponent from being subjected to harassment or duress when making a deposition:

> [52] I observe that a deposition is required to be made before a Sessions Court judge or a Magistrate if made in Malaysia. I am of the view that such requirement is clearly intended to prevent a deponent from being subjected to harassment or duress when making a deposition. The reason a deposition has to be made before a Sessions Court judge or Magistrate is to ensure that justice is administered and accorded to the deponent when making the deposition.

[18] In *Gakyah Buyong lwn. PP* [2016] 3 CLJ 919 the High Court decided that the deponents could be cross-examined by referring to s. 52 of ATIPSOM. However, the Court of Appeal set aside the High Court decision and preserved the position that the deponents of the depositions could not be cross-examined.

[19] In *PP v. Sumon Khan & Anor* [2018] 1 LNS 1506; [2019] 2 MLJ 215, the Court of Appeal concurred with the High Court that the depositions made would still be subject to an analysis of its contents irrespective of the non-allowance for cross-examination and thus in the final decision made, the totality of evidence would form the basis for the decision and not a total reliance on the deposition alone:

> [43] However; we agree with the learned trial judge that ID7 (1-13) cannot be admitted on other grounds, namely:
>
> (a) S 61A of the Act requires that before the depositions of the Bangladeshis can be admitted as evidence, there must be an order for removal of the Bangladeshis issued by the Director General (DG) of Immigration Department. In the present appeal, there was never any order of removal by the DG of Immigration ever produced by the prosecution. The rationale of allowing admissibility of admissions of migrant persons under s. 61A of the Act was to cater for situations where the migrants were removed by order of the DG of Immigration and hence their presence as witnesses could no longer be procured to support a charge under the Act against accused persons. Hence, the depositions (which are hearsay evidence) are allowed to be admitted. Without the order for removal, these depositions cannot be admitted. However, the prosecution could still adduce direct evidence by calling the subject ie the migrants themselves to testify, if they could be located. In the present appeal it is not clear whether the migrants were still available to testify or whether there was such an order from the DG of Immigration for their removal.
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> ...
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> [44] It is also the finding of the learned judge that, even assuming that the 13 depositions ID7 (1-13) could be admitted as evidence, there is still the issue of the weight to be attached to the same given that the deponents are not subjected to cross-examination. We agree with the analysis by the learned trial judge as to the contents of the depositions to arrive at such conclusion. This is because the contents of the depositions of the Bangladeshis:
>
> (a) did not aver that they wanted to be smuggled as migrants into Malaysia nor did they state that anyone specific and/or any named persons/persons told them that they would be brought into Malaysia using unlawful means;

A (b) did not state that such person/s told them that they would be brought or smuggled into Sarawak or Malaysia without proper travelling documents or using unlawful papers. In fact, the depositions state '... telah memaklumkan bahawa segala dokumen perjalanan saya telah siap ...' which gives the indication that all their travel documentation were ready and completed lawfully; and

B (c) did not state they had to engage unlawful/false passports/visas to get them smuggled into Malaysia as migrants and to work illegally.

[45] What is pertinent is that, the 13 depositions did not implicate the first and the second accused and/or Sivasankar that each of them were part of the plan to smuggle the said 13 Bangladeshis into Malaysia using C unlawful means. There is no evidence that the 13 Bangladeshis had entered Indonesia or Malaysia illegally as it is undisputed that the 13 Bangladeshis had valid single entry visas and passports to enter Malaysia or Indonesia.

[46] Therefore, premised on the aforementioned. The learned trial judge D did not err when His Lordship refused to admit and placed no weight on the said depositions of the 13 Bangladeshis ie ID7 (1-13).

[20] In *Amurthalingam Tamajeeran v. PP* [2018] 1 CLJ 662; [2018] 12 MLJ 529, the High Court in being moved to make a revision of the Magistrate's decision to disallow cross-examination of witness making a deposition E decided to concur with the Magistrate by deciding that since it was made under s. 61A of ATIPSOM, the admissibility as such is not subject to the Evidence Act 1950 which provides the right to cross-examine:

[17] A plain reading of s. 61A on the other hand, relates to a situation where the deposition of a person who is both a smuggled migrant or a F trafficked person and whom in respect of which an order of removal from Malaysia has been made by the Director-General of Immigration, becomes admissible as *prima facie* evidence of any fact stated therein. In this case, the respondent contended that the persons from whom the depositions were taken were smuggled migrants.

G [31] Section 61A on the other hand, deals with the admissibility of depositions and not with the recording of evidence on oath as is the case under s. 52.

[32] The opening words of s. 61A namely "notwithstanding anything contained in this Act and any written law to the contrary", indicates the H exclusion of the provisions of the Evidence Act 1950 and hence the right to cross-examine.

[35] The other material distinction is that s. 52 relates to a situation where a criminal prosecution has already been instituted meaning that a person is already charged. Section 61A on the other hand, relates to the taking of a deposition that can be taken at any time and even before a charge I has been instituted.

[36] It is obvious that the intent of s. 61A is to pre-empt a situation where the smuggled or trafficked person may be subject to deportation by virtue of an order made by the Director-General under the relevant provisions of the Immigration Act 1959/63.

[37] Section 61A (10(a) and (b) also allows such a deposition to be taken in the presence or absence of the person charged with the offence.

...

[44] The respondent had also submitted that the witnesses were persons who could not be found within the meaning of s. 61A. In their affidavit affirmed on 23 August 2017, it was stated that the immigration department had deported 13 of the deponents. The report of the immigration department was also attached as exh. "SAA1". These deponents were now persons who cannot be found within the meaning of s. 61A.

[45] I was satisfied that the depositions were indeed taken under s. 61A and not the case where the evidence was recorded on oath pursuant to s. 52. There was no right to interfere therefore for the applicant to cross-examine.

[21] In *PP lwn. Ibrahim Sultan Mohamad* [2020] 1 LNS 974, it was held that the deposition can be accepted provided that there has been an order for removal of the deponent from the Director General of Immigration and the burden rests on the prosecution to provide evidence pertaining to the removal order:

[13] Pada pendapat Mahkamah ini, sandaran kepada deposisi di bawah Seksyen 61A ATIPSOM hanya boieh dibuat apabila deponen itu tidak hadir di Mahkamah perbicaraan kes ATIPSOM atas sebab satu perintah pemindahan telah dibuat terhadapnya oleh Ketua Pengarah Imigresen. Sekiranya tiada perintah sedemikian dibuat maka keterangan deposisi itu tidak boleh diterima sebagai keterangan *prima facie*, tanpa bukti lanjut, mengenai fakta yang dinyatakan di dalamnya. Dalam keadaan ini pihak Pendakwaan harus mengemukakan bukti lanjut sama ada melalui keterangan lisan, keadaan atau dokumentar mengenai fakta yang dinyatakan di dalam deposisi itu.

...

[16] Dengan yang demikian, pada pendapat Mahkamah ini, Mahkamah yang membicarakan kes ATIPSOM adalah Mahkamah yang harus berpuas hati bahawa satu perintah pemindahan telah dibuat oleh Ketua Pengarah imigresen terhadap deponen sebelum deposisi itu boleh diterima sebagai keterangan. Dalam keadaan demikian, adalah menjadi beban ke atas Pendakwaan untuk memberi keterangan mengenainya seperti yang dinyatakan oleh Dr Choo Kah Sing PK (pada ketika itu) di dalam kes *Mohd Faudzi* (*supra*).

[22] From the decided cases, this court is of the opinion that s. 61A is concerned only with *prima facie* evidence and the consideration of the deposition in itself does not provide a *prima facie* case whereby in order to establish a *prima facie* case the courts still have to view the evidence in totality in arriving at a decision. This goes to show that the court's function as the final arbiter is not encroached upon and thus the section does not usurp the powers of the court hence s. 61A of ATIPSOM does not infringe art. 121(1) of FC.

Article 5(1) Of Federal Constitution

[23] The applicants argue that by having this article, it does not authorise Parliament to enact any legislation that would deprive life or liberty contrary to the Federal Constitution or the rule of law with art. 5(1) stating:

> No person shall be deprived of his life or personal liberty save in accordance with the law.

[24] The applicants further argue that s. 61A has deprived the applicants of their liberty by having the provision that the deponents cannot be cross-examined for their depositions thus there is a clear violation of statutory requirement of the Evidence Act and Criminal Procedure Code. The wording of 'notwithstanding anything contained in this Act and any written law' does not purport to exclude the concept of rule of law.

[25] In *Public Prosecutor v. Ooi Kee Saik & Ors* [1971] 1 LNS 113; [1971] 2 MLJ 108, the late and venerable Raja Azlan Shah stated:

> But as far as I am aware, no constitutional state has seriously attempted to translate the 'right' into an absolute right. Restrictions are a necessary part of the 'right' and in many countries of the world freedom of speech and expression is, in spite of formal safeguards, seriously restricted in practice.

[26] In *Re Mohamad Ezam Mohd Nor* [2002] 5 CLJ 156, it was enunciated as below:

> The primary provision upon which the above is founded is art. 5(1) of the Federal Constitution, which provides:
>
> No person shall be deprived of his life or personal liberty save in accordance with the law.
>
> The words 'save in accordance with the law' require that there must be specific and explicit law that actually provides for it. Since the Federal Constitution is the supreme law of the Federation, such strict interpretation is to be applied in interpreting s. 117 CPC. There is no room for permissive interpretation that a deprivation of the liberty of the suspect to enable the police to question or interrogate him is allowed because there is no law against it when s. 117 CPC itself does not make it clear.

[27] For s. 61A of ATIPSOM it is apparent that the provision explicitly provides for the acceptance of depositions without being subjected to cross examination.

[28] 'In accordance with law' has been interpreted as such in these authorities:

(i) The phrase 'in accordance with law' in art. 5(1) 'is wide enough to cover procedure as well' (*Re Tan Boon Liat @ Allen & Anor Et Al; Tan Boon Liat v. Menteri Hal Ehwal Dalam Negeri & Ors And Chuah Han Mow v. Menteri Hal Ehwal Dalam Negeri & Ors And Subramaniam v. Menteri Hal Ehwal Dalam Negeri & Ors* [1977] 1 LNS 110; [1977] 2 MLJ 108) and which procedure must not be arbitrary or unfair (*Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 2 CLJ 771; [1996] 1 MLJ 261);

(ii) Implies a fair trial (*Shamim Reza Abdul Samad v. PP* [2009] 6 CLJ 93; [2011] 1 MLJ 471) in both procedure and substance (*Lee Kwan Woh v. PP* [2009] 5 CLJ 631; [2009] 5 MLJ 301; see also *Deputy Chief Police Officer Of Perak & Anor v. Ramesh Thangaraju* [2001] 1 CLJ 245; [2001] 1 MLJ 161), within a reasonable time by an impartial court established by law (*PP v. Choo Chuan Wang* [1992] 2 CLJ 1242; [1992] 3 CLJ (Rep) 329);

(iii) Accords a fundamental right of access to justice (*Sivarasa Rasiah v. Badan Peguam Malaysia & Anor* [2010] 3 CLJ 507; [2010] 2 MLJ 333);

(iv) It was also enunciated that art. 5(1) 'guarantees that neither life nor personal liberty may be deprived save in accordance with law' (*Shamim Reza Abdul Samad v. PP* [2009] 6 CLJ 93; [2011] 1 MLJ 471 per Gopal Sri Ram FCJ, delivering the judgment of the court) and that art. 5(1) stipulates that no person shall be deprived of his life or personal liberty save in accordance with the law ... this right to personal liberty is not absolute and is subject to qualifications; and

(v) *In Re Mohamed Ezam Mohd Nor* [2002] 5 CLJ 156; [2001] 3 MLJ 372, it was held that the phrase 'save in accordance with law' in art 5(1) requires that there must be specific and explicit law that actually provides for it.

[29] It has always been the position of the law that the right is not absolute. Given the fact that s. 61A of ATIPSOM is a specific and explicit law which has been provided for as being the exclusion stated in art. 5(1) of FC, hence the application of s. 61A of ATIPSOM cannot be deemed to be in contravention of art. 5(1) of FC.

[30] It does not deny a fair trial since the deposition is only a single aspect of the evidence to be produced at trial and even then it is still subject to be examined by the trial judge as decided in *PP v. Sumon Khan*. This evidence

by deposition is not the be all and end all as regards evidence to prove a *prima facie* case. Thus, this court views that the impugned provision does not infringe upon art. 5(1) of the FC.

Article 8(1) Of The Federal Constitution

[31] Article 8(1) of FC deals with equal protection of the law with no discrimination against citizens irrespective of race, religion, descent, place of birth or gender with the exact wording being:

> Equality
>
> 8(1) All persons are equal before the law and entitled to the equal protection of the law.
>
> (2) Except as expressly authorised by this Constitution, there shall be no discrimination against citizens on the ground only of religion, race, descent, place of birth or gender in any law or in the appointment to any office or employment under a public authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment.

[32] The applicants argue that all persons are equal before the law and equal protection of the law, hence the applicants should be fairly treated with fair procedure. Denial of the right to challenge the deposition and to cross examine the witness is a clear violation of art. 8(1) of the FC. As all persons are equal before the courts and tribunals the applicants are entitled to equal treatment in the trial process in the determination of the charges faced by the applicants.

[33] In *Datuk Hj Harun Hj Idris v. PP* [1976] 1 LNS 19; [1977] 2 MLJ 155 it was held that the equality provision is not absolute and it does not mean that all laws must apply uniformly to all persons in all circumstances everywhere. Lord President Suffian has laid down the principle involved by stating:

> Doing the best we can, we are of the opinion that the principles relevant to this appeal that may be deduced from the Indian decisions and from consideration of our constitution are these:
>
> 1. The equality is not absolute. It does not mean that all laws must apply uniformly to all persons in all circumstances everywhere.
> 2. The equality provision is qualified. Specifically, discrimination is permitted within clause (5) of Article 8 and within Article 153.
> 3. The prohibition of unequal treatment applies not only to the legislature but also to the executive – that is seen from the words "public authority" in clause (4) and "practice" in clause (5)(b) of Article 8.

4. The prohibition applies to both substantive and procedural law. A

5. Article 8 itself envisages that there may be lawful discrimination based on classification – thus Muslims as opposed to non-Muslims (para, (b) of clause (5) of Article 8); aborigines as opposed to others (para, (c)); residents in a particular state as opposed to residents elsewhere (para, (d)); and Malays and natives of Borneo as opposed to others who are not (Article 153). B

6. In India the first question they ask is, is there classification? If there is and subject to other conditions, they uphold the law. If there is no classification, they strike it down.

With respect we would agree with the Solicitor-General's submission that the first question we should ask is, is the law discriminatory, and that the answer should then be – if the law is not discriminatory, if for instance it obviously applies to everybody, it is good law, but if it is discriminatory then because the prohibition of unequal treatment is not absolute but is neither expressly allowed by the constitution or is allowed by judicial interpretation we have to ask the further question, is it allowed? If it is, the law is good, and if it is not, the law is void. C D

7. In India discriminatory law is good law if it is based on "reasonable" or "permissible" classification, using the words used in the passage reproduced above from the judgment in *Shri Ram Krishna Dalmia* AIR 1958 SC 538, provided that E

(i) The classification is founded on an intelligible differentia which distinguishes persons that are grouped together from others left out of the group; and

(ii) The differentia has a rational relation to the object sought to be achieved by the law in question. The classification may be founded on different bases such as geographical, or according to objects or occupations and the like. What is necessary is that there must be a nexus between the basis of classification and the object of the law in question. F

The Solicitor-General submits that if the Indian doctrine of classification is to be accepted by our courts, which he argues has not been done, it may be accepted subject to the modification that the courts should not take it upon itself to consider whether the classification is reasonable or not, a task which should be left to the legislature. In our opinion the doctrine of classification should be accepted by our courts, subject to what we said in paragraph 6 above. We adhere to what was said in *Public Prosecutor v. Khong Teng Khen* [1976] 2 MLJ 166 at page 170: G H

Para 19

The principle underlying Article 8 is that a law must operate alike on all persons under like circumstances, not simply that it must operate alike on all persons in any circumstances, nor that it 'must I

be general in character and universal in application and that the State is no longer to have the power of distinguishing and classifying persons ... for the purpose of legislation', *Kedar Nath v. State of West Bengal* 9 AIR 1953 SC 404 406). In my opinion, the law may classify persons into children, juveniles and adults, and provide different criteria for determining their criminal liability or the mode of trying them or punishing them if found guilty; the law may classify persons into women and men, or into wives and husbands, and provide different rights and liabilities attaching to the status of each class; the law may classify offences into different categories and provide that some offences be triable in a Magistrate's court, others in a Sessions Court, and yet others in the High Court; the law may provide that certain offences be triable even in a military court; fiscal law may divide a town into different areas and provide that ratepayers in one area pay a higher or lower rate than those in another area, and in the case of income tax provide that millionaires pay more tax than others; and yet in my judgment none of these cases can the law be said to violate article 8. All that Article 8 guarantees is that a person in one class should be treated the same as another person in the same class, so that a juvenile must be tried like another juvenile, a ratepayer in one area should pay the same rate as paid by another ratepayer in the same area, and a millionaire the same income tax as another millionaire, and so on. As regards the narrower question whether or not the courts should leave it to the legislature alone to go into the reasonableness of the classification, we think that the court should not, that in other words the court should consider the reasonableness of the classification.

8. Where there are two procedures existing side by side, the one that is more drastic and prejudicial is unconstitutional if there is in the law no guideline as to the class of cases in which either procedure is to be resorted to. *But it is constitutional if the law contains provisions for appeal, so that a decision under it may be reviewed by a higher authority. The guideline may be found in the law itself; or it may be inferred from the objects and reasons of the bill, the preamble and surrounding circumstances, as well as from the provisions of the law itself. The fact that the executive may choose either procedure does not in itself affect the validity of the laws.* (Minority judgment in *NI Caterers* AIR SC 1581 and judgment in *M Chhagganal* AIR 1974 SC 2009. We think that we should follow the same principle.

9. In considering Article 8 there is a presumption that an impugned law is constitutional, a presumption stemming from the wide power of classification which the legislature must have in making laws operating differently as regards different groups of persons to give effect to its policy. (Per Sastri CJ in *Anwar Ali* AIR 1952 SC 75).

10. Mere minor differences between two procedures are not enough to invoke the inhibition of the equality clause (per Bhagwati J in *Chhagganlal* AIR 1974 SC 2009.

[34] In item 8 of the above-cited case it was held, where there are two procedures existing side by side, the one that is more drastic and prejudicial is unconstitutional if there is in the law no guideline as to the class of cases in which either procedure is to be resorted to, but it is constitutional if the law contains provisions for appeal, so that a decision under it may be reviewed by a higher authority. This court views that s. 61A does not fall foul of this condition as to infringe upon art. 8 of the FC given the provision for appeal therein contained in ATIPSOM 2007.

[35] The authority of *Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat & Another Case* [2017] 5 CLJ 526; [2017] 3 MLJ 561 must be distinguished as s. 40 of the Land Acquisition Act 1960 has the effect of the court having to abdicate its power to make a ruling by having to defer to the assessors in the granting of the award. For s. 61A of ATIPSOM the court does not defer to anyone or entity in deciding and retains absolute power in making a judicial assessment as regards the deposition made.

Section 5 Of ATIPSOM

[36] The section reads:

> (1) The provisions of this Act shall be in addition to, and not in derogation of, the provisions of any other written law relating to trafficking in persons and smuggling of migrants
>
> (2) In any event of any conflict or inconsistency between the provisions of this Act and those in any written laws, the provisions of this Act shall prevail and the conflicting or inconsistent provisions of such other written laws shall, to the extent of the conflict or inconsistency, be deemed to be superseded,

[37] From the reading of s. 5 of ATIPSOM it is clear that the provisions contained in the Act ie in this situation, s. 61A would override the requirement as found in s. 145 of Evidence Act 1950 due to the use of the maxim *generalibus specialia derogant*.

[38] Section 5 of ATIPSOM itself provides for the application of ATIPSOM 2007 to prevail in the event that it conflicts with provisions of other written laws and supersedes the other written laws and this is the situation of the maxim *generalibus specialia derogant* being applicable which is that a general Act is made subject to a specific Act. There are apparent that certain specific provisions in the legislation are designed to prevail over the more general provisions of the law and these must be given its full effect which is the foundation of this maxim.

[39] The maxim was explained in *PP v. Chew Siew Luan* [1982] CLJ 354; [1982] CLJ (Rep) 285 that held:

A *Generalibus specialia derogant* is a cardinal principle of interpretation. It means that where a special provision is made in a special statute, that special provision excludes the operation of a general provision in the general law … It would be erroneous to apply expressions used and provisions made in a statute to another and entirely different one in complete disregard of the latter's express stipulations in light of its specific purpose and object.

B

Conclusion

[40] Section 61A of ATIPSOM as decided in *Abul lwn. PP* (Rujukan Jenayah No. 44-48-04-2017) does not have the same effect as *Semenyih Jaya* as its promulgation is to resolve the issue found in s. 35 of the Immigration Act 1959/63 whereby the witnesses who are migrants that needed to be deported would not have to wait until the conclusion of the trial for the process of deportation to be completed.

C

[41] The provision of s. 32 of the Evidence Act shares a similarity with s. 61A of ATIPSOM that enables the witnesses that are untraceable to have their evidence accepted in their absence and without being cross-examined. The process of appeal is also available and using the principle laid down in *Datuk Hj Harun Idris*, this ensures the constitutionality of s. 61A of ATIPSOM.

D

E

[42] The Court of Appeal in Criminal Appeal no. B-05-335-08-2017 upheld the decision in *Vigneswaran Murugaiah lwn. PP* (Permohonan Jenayah no. 44-85-04-2017), wherein it was decided that s. 61A of ATIPSOM is a special provision that exempts the right to cross-examine under s. 146 of the Evidence Act with the provision not being unconstitutional. Hj Ghazali Hj Cha J stated in the criminal application:

F

> Walau bagaimanapun saya tidak bersetuju dengan hujahan peguambela tersebut berdasarkan kepada atasan-alasan berikut:
>
> (a) Seksyen 61A Akta 670 seperti yang dihujahkan oleh Responden merupakan satu peruntukan khas yang mengecualikan hak untuk menyoal balas di bawah Seksyen 146 Akta Keterangan 1950. Niat Parlimen untuk mengecualikan perkara ini hendaklah direalisasikan.

G

[43] As a conclusion, this court decides that s. 61A of ATIPSOM does not contravene arts. 121(1), 8(1) and 5(1) of FC and should not be declared unconstitutional. Hence, this motion is hereby dismissed.

H

I